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Searle v. Searle Appellant's Brief 1 Dckt. 45029

IN THE SUPREME COURT OF THE STATE OF IDAHO

LISA M. SEARLE, nka LOOSLE, Plaintiff/Appellant, vs. DUSTIN SEARLE, Defendant/Respondent.	Supreme Court Docket No. 45029-2017

APPELLANT'S BRIEF

Direct Appeal from the District Court of the Seventh Judicial District for Bingham County.

Honorable Scott H. Hansen, Magistrate Judge presiding.

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I. STATEMENT OF THE CASE

A. Nature of the Case.

This case comes before the Court after Respondent moved to modify child support after losing his job in the oil fields. Over a year after his initial petition, he requested a modification in child custody, which only petitioned for an increase in his parental time and an order keeping the minor child in the State of Idaho. In the last minutes of trial, he requested that the minor child live with him, a move that appears to be mainly motivated by a desire to avoid paying child support as he has had a difficult time maintaining employment since May 2015.

The previous custody arrangement, which was entered in 2013, was tailored specifically to allow Appellant to remain in Virginia after moving in 2012. Unfortunately, due to severe unexpected illness, Appellant was forced to return to Boise in late 2014. Now that her health has been restored, Appellant had the opportunity to significantly improve her financial situation by returning to the same community in Virginia. After hearing a trial on Respondent's petitions, the Magistrate erroneously determined that there was a material and substantial change of circumstances and that it was in the best interests of the minor child to attend school in Shelley, Idaho.

There has not been a material and substantial change of circumstances warranting a custody modification. This Court has been clear, especially in recent years, that a Magistrate must make specific findings of how the alleged change of circumstances has affected the child. There is nothing on the record or the Magistrate's findings that shows that the minor child has done anything but thrive in the care of Appellant and that returning to Virginia would not have

changed anything in her visitations with Respondent or her relationship with him. The previous custody order was specifically designed for the minor child to be residing in Virginia, making her return to Virginia a foregone acceptable conclusion.

Furthermore, the minor child has been accustomed to being enrolled in gifted and talented programs, something that she needs due to her high intellect. This need clearly would not be met by requiring her to attend school in Shelley, Idaho.

The Magistrate also erred because his findings of fact are insufficient as a matter of law. Therefore, this Court should reverse the Magistrate and return the custody arrangement to the 2013 custody order.

B. Procedural History

On April 27, 2007, Appellant filed a *Complaint for Divorce* in Ada County. R. at 14–19; 128. The case was transferred to Bonneville County and a *Decree of Divorce* was granted on September 17, 2007. R. at 20–21; 128. The case was then transferred to Canyon County on February 1, 2012, and that court entered its order regarding custody on August 23, 2012. R. at 52–53; 128. In October 2012, Respondent filed a modification action in Bingham County in response to Appellant moving to Virginia. R. at 129. A trial was held on Respondent's modification request and the Magistrate determined that it was in the minor child's best interest to move to Virginia with Appellant ("2013 Custody Order"). R. at 129.

On May 15, 2015, Respondent filed his *Verified Petition for Modification*, which only requested a modification to child support. R. at 91–93. Appellant filed a response to this petition on June 25, 2015. R. at 94-98. Respondent filed an *Amended Verified Petition for Modification* to request that the Magistrate bar Appellant from moving to Virginia and request more visitation

on July 15, 2016, over a year after his initial petition. R. at 115–18. The amended petition was responded to on August 5, 2016. R. at 121–24. On December 16, 2016, the Court held a trial on the issues raised in the *Amended Verified Petition for Modification*. R. at 129. The Court issued its *Memorandum Decision and Order* on January 6, 2017 ("2017 Custody Order"). R. at 128–36. Appellant filed a *Motion to Reconsider* and an *Affidavit in Support of Motion to Reconsider* on January 13, 2017. R. at 137–40. Appellant then filed a *Supplemental Affidavit in Support of Motion to Reconsider* on January 17, 2017. *Judgment* was entered on January 30, 2017. R. 158–63. Appellant's *Motion to Reconsider* was heard on March 7, 2017, after which the Court issued its *Order re Motion to Reconsider* denying the *Motion to Reconsider* ("Order on Reconsideration"). R. at 179–81. Appellant then requested a direct appeal to this Court, which was granted on May 16, 2017. R. at 184–85. Appellant filed a *Notice of Appeal* on June 5, 2017. R. at 186–91.

C. Statement of Facts

The parties were married on June 17, 2005 in Salt Lake City, Utah. R. at 15. They had one child during the course of the marriage, B.G.S., born June 13, 2006. R. at 15. Irreconcilable differences arose between the parties and they were divorced on September 17, 2007, with the parties sharing legal custody of B.G.S. and Appellant ("Lisa") having primary physical custody of B.G.S. R. at 20–33. Lisa has maintained primary physical custody of B.G.S. since September 2007 until the 2017 Custody Order. R. at 54–66; 81–85 (the Magistrate characterized primary physical custody in this order as school year custody); 128–34.

In August 2012, Lisa moved to Virginia. R. at 82. The Magistrate determined it was in

the best interests of B.G.S. to move to Virginia with Lisa and set out a custody schedule to allow both parents to have a relationship with B.G.S. R. at 81–85. Respondent has commented that this order "is not a bad one." Trial Tr. 48:21.

From 2009 to May 2015, Respondent was spending approximately seventy-five percent (75%) of his time working out of state, except for the summers of 2013 and 2014. Trial Tr. 54:8–55:21. His employment at the time of trial was "seasonal" and he claims he could work at McDonalds to pay all his bills. Trial Tr. 59:19–60:14. He has not requested nor has exercised any extra visitation since Lisa moved to Boise, which was over two years preceding trial. Trial Tr. 70:13–70:18. Respondent maintained a good relationship with B.G.S. while she was in Virginia and continues to have a good relationship with her. Trial Tr. 72:30–73:10; 97:3–97:8.

Since her separation from Respondent, Lisa has gained two masters degrees, one in educational leadership and the other as a psychological school examiner. Trial Tr. 90:2–90:4. Lisa lived in Virginia with B.G.S. for approximately three (3) years before moving back to the Boise area due to complications associated with Lyme disease. Trial Tr. 29:5–29:25. This move to Boise was with the express permission of Respondent. Trial Tr. 65:18–65:23. She is currently working on an educational specialist degree, which requires an internship to finish. Trial Tr. 90:8–91:1. At the time of trial, she had been offered a paid internship in Virginia in the same school district that B.G.S. had previously attended. Trial Tr. 91:2–91:6. She would have the potential of earning up to $140,000.00 a year in Virginia, a significant increase to what she has the potential of earning in Idaho. Trial Tr. 91:2–92:6. Even though all the evidence presented at trial showed that there would be no effect on B.G.S. if she moved back to Virginia with Lisa, Lisa testified on reconsideration that she has turned down the position in Virginia in order

address the concerns the Magistrate stated in his January 2017 decision. R. at 139–40; Trial Tr. 105:14–105:22.

During her time in Boise and Virginia, B.G.S. has been placed in the gifted and talented programs. Trial Tr. 33:3–64:9. B.G.S. has changed schools a number of times, however, all but one of those changes was due to the fact that she was placed in the gifted and talented programs. Trial Tr. 33:3–64:9; R. at 144. Lisa has been the parent who has attended all of the parent teacher conferences and has handled all the day to day obligations that go along with being a primary custodian. Trial Tr. 99:20–102:15.

B.G.S. has special needs because of her high intellect. Trial Tr. 36:17:–36:19; R. at 156–57. Virginia offers more resources for gifted and talented students than Idaho does, especially rural Idaho. Trial Tr. 36:17–37:3; R. at 141–55. Respondent believes that B.G.S. having a relationship with her cousins is more important than being in a gifted and talented program. Trial Tr. 47:18–48:3; 87:9–87:11. B.G.S. has significant connections to family and friends in both Boise and Virginia. Trial Tr. 92:23–93:1; 116:25–117:13. In fact, since moving to Boise, B.G.S. stays in regular contact with a number of her friends in Virginia and has even returned to Virginia after moving to Boise to visit these friends. Trial Tr. 92:23–93:1.

B.G.S. suffers from separation anxiety, which manifests itself when she spends a significant amount of time away from her primary caregiver, Lisa. Trial Tr. 97:10–97:12; 99:16. This has not improved by moving to Boise. Trial Tr. 97:10–97:12. B.G.S. also has an autoimmune disorder that requires specialized treatment. Trial Tr. 99:17–99:19; 110:6–110:18. Respondent was unaware of the autoimmune disorder B.G.S. has or the care that is required for this disorder. Trial Tr. 85:16–86:1. He characterized it as having bad muscle tone. Trial Tr.

85:16–86:1.

Lisa always encourages B.G.S. to call her father, even if he is not answering. Trial Tr. 35:16–36:1. Except for one incident that took place over four years before trial, there is no evidence on the record that Respondent has been unable to exercise his visitation through any effort on the part of Lisa. Trial Tr. 102:16–103:12. There have been some issues with Respondent keeping Lisa informed of what is happening with B.G.S. when he has custody of her. Trial Tr. 115:25–116:6. When directly questioned by the Magistrate how Respondent plans to handle body changes that take place in adolescents, such as menstruation, Respondent stated he would read books and refer B.G.S. to her aunt, not her mother with whom she undisputedly has a close relationship. Trial Tr. 124:17–125:9. At all times since the last custody order was entered, the parties have exchanged visitation as ordered, whether Lisa resided in Virginia or Boise. Trial Tr. 115:25–116:6.

II. ISSUES PRESENTED ON APPEAL

A. Did the Magistrate Err in Concluding that There Was A Material and Substantial Change of Circumstances in Its January 6, 2017 Decision and Reaffirming that Decision in Its *Order re Motion to Reconsider*?

B. Did the Magistrate Err in Concluding that It Was in the Best Interests of the Minor Child to Change Primary Custody in Its January 6, 2017 Decision and Reaffirming that Decision in Its *Order re Motion to Reconsider*?

C. Did the Magistrate Err in His Findings of Facts in Its January 6, 2017 Decision and in Its *Order re Motion to Reconsider*?

D. Is Appellant Entitled to Attorney Fees on Appeal?

III. ARGUMENT

A. THE MAGISTRATE ERRED IN FINDING A MATERIAL AND SUBSTANTIAL CHANGE OF CIRCUMSTANCES

1. Standard of Review

On permissive appeal under I.A.R. 12.1, this Court "reviews the magistrate judge's decision without the benefit of a district court appellate decision. A trial court's child custody decision will not be overturned absent an abuse of discretion. *Lamont v. Lamont* 158 Idaho 353, 356, 347 P.3d 645, 648 (2015) (citing *Roberts v. Roberts*, 138 Idaho 401, 403, 64 P.3d 327, 329 (2003). On the abuse of discretion standard of review, appellate courts consider: "(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason." *Evans v. Sayler*, 151 Idaho 223, 226, 254 P.3d 1219, 1222 (2011) (quoting *Chavez v. Barrus*, 146 Idaho 212, 225, 192 P.3d 1036, 1049 (2008)). "Modification of child custody may be ordered only when there has been a material, substantial and permanent change of circumstances indicating to the magistrate's satisfaction that a modification would be in the best interests of the child." *Doe v. Doe*, 161 Idaho 67, 383 P.3d 1237, 1241 (2016) (quoting *Sweet v. Foreman*, 159 Idaho 761, 765, 367 P.3d 156, 160 (2016)).

"An abuse of discretion occurs when the evidence is insufficient to support a magistrate's conclusion that the interests and welfare of the children would be best served by a particular custody award or modification." *Id.* (quoting *Nelson v. Nelson*, 144 Idaho 710, 713, 170 P.3d 375, 378 (2007)). "When reviewing the trial court's conclusions of law, however, this Court

exercises free review of the court's decision to determine whether the court correctly stated the applicable law, and whether the legal conclusions are sustained by the facts found." *Nelson*, 144 Idaho at 713, 170 P.3d at 378 (citing *State v. Hart*, 143 Idaho 721, 723, 132 P.3d 1249, 1251 (2006)).

2. The evidence does not support a conclusion of law that there was a material and substantial change of circumstances.

The reasons that the Magistrate concluded that there was a material and substantial change of circumstances were: (1) Lisa moved from Virginia to Idaho; (2) Lisa plans to move back to Virginia in August of 2017; (3) Respondent lost his job in the oil field and earns substantial less than he previously earned; and (4) Lisa's history and pattern of moving calls into question of the minor child's stability while in Lisa's care. R. at 131. The Magistrate erred in concluding these were material and substantial changes of circumstances because it was not consistent with the legal principles for determining a material and substantial change of circumstances and was not reached by an exercise of reason.

"The question of whether a material, permanent and substantial change in conditions exists is a preliminary question to what changes in the custody order would be in the best interests of the children." *Doe*, 383 P.3d at 1242 (quoting *Evans v. Sayler*, 151 Idaho 223, 226, 254 P.3d 1219, 1222 (2011)) (internal quotations omitted). "[This] requirement reflects a policy against continuous relitigation and alteration of custody decisions." *Id.* (quoting *Evans v. Sayler*, 151 Idaho 223, 226, 254 P.3d 1219, 1222 (2011)). "This Court has made it clear that whether a change in conditions is 'material' or 'substantial' depends upon the impact of the change on the children." *Id.* at 1243.

In *Doe*, this Court determined that the magistrate had abused its discretion because the evidence did not support a finding that a material and substantial change of circumstances warranting a change of custody. *See generally Id.* The mother in *Doe* temporarily moved from Rexburg to Idaho Falls. *Id.* at 1247. The magistrate determined that this was a material and substantial change of circumstances. *Id.* This Court reversed that determination, highlighting the fact that the father did not have any right under the decree to prevent such a move, that the move would not prevent the father from continuing the same relationship the children were accustomed having with him, and that it would not prevent the father from exercising the visitation granted to him under previous court orders. *Id.* Furthermore, the magistrate's determination that a temporary custody change was a material and substantial change of circumstances was reversed because the magistrate "made no findings as to the effect the…change had on the children." *Id.* at 1248.

In *Evans*, this Court upheld the decision of the magistrate that there was not a material and substantial change of circumstances. *Evans v. Sayler*, 151 Idaho 223, 227–28, 254 P.3d 1219, 1223–24. The mother attempted to claim there was a material and substantial change of circumstances based upon her claim that she was no longer going to be attending school. *Id.* This Court reasoned that the mother's decision to not attend school did not mean her long term plans had changed, and that she was just having "buyers remorse" over the previous stipulation to modify the previous custody arrangement. *Id.*

Here, the Magistrate abused its discretion similar to the magistrate in *Doe*. The Magistrate's conclusion that there was a material and substantial change of circumstances warranting a change of custody all revolved around the fact that Lisa moved from Virginia to

Boise and the fact that she wanted to move back to Virginia.[1] Just as the father in *Doe* did not have the right to prevent the mother from moving, so here, Respondent lacks the right to prevent a move to Virginia. The 2013 Custody Order specifically gave Lisa the right to move to Virginia and Respondent had specifically agreed to the move to Boise during Lisa's 2014 illness. Whether Lisa resides in Virginia or Boise, Respondent would have continued the same relationship with B.G.S. and continued to have the same visitation rights; nothing had changed and nothing would have changed, just as in *Doe*.

This case is similar to *Evans* because Lisa's long term plans at trial were the same as they were in the 2013 Custody Order, to move to Virginia to finish schooling and start a career. While she had moved back to Boise, this was due to illness that was out of her control. Respondent seems to have been motivated by reducing child support, just as the mother in *Evans* was motivated by regret, as he had requested a reduction in child support fourteen months before he requested a change in custody. Even then, it was only a request for more time and for Lisa to remain in Idaho, not to become the primary custodian. His testimony at trial seemed focused more around B.G.S. spending time with his extended family rather than spending time with him, even going as far as to infer it would be better for B.G.S. to discuss menstruation with her aunt instead of her own mom.

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[1] The conclusion of law that Respondent had lost his job appears to be related to child support not child custody. Lisa concedes that this conclusion is appropriate only for an adjustment of child support. To the extent that this conclusion was related to child custody, it was a reversible error because the Magistrate failed to specify how this affected B.G.S. It is also clear from the Magistrate's decision that he anticipated Lisa living in Virginia. The Magistrate did not change the cost allocation for travel from its previous order, so the Court anticipated the cost of Lisa living in Virginia would be the same whether Lisa had primary custody or not. In this respect, the conclusion was not reached by an exercise of reason as the cost for travel would not change for Respondent making his reduction of income irrelevant for child custody reasons.

Most importantly, the Magistrate failed to make any findings on how these moves, potential or otherwise, had a detrimental effect on B.G.S. that would justify a change in custody. This is a reversible error because the legal standards established by this Court require a specific finding on how the changes in circumstances affect the child. The Magistrate made a *per se* conclusion that the moves were a material and substantial change of circumstances without determining how those moves affected B.G.S.

Failing to provide specific findings on how the changes affected the child also shows that the Magistrate failed to reach his decision through an exercise of reason. This error is even more blatant based on the evidence presented at trial, specifically, that B.G.S. was well adjusted with Lisa, had a good relationship with Respondent, and this would continue into the future no matter where Lisa chose to reside. Therefore, the Court should find the Magistrate erred in finding a material and substantial change of circumstances.

B. THE MAGISTRATE ERRED IN CHANGING PRIMARY CUSTODY

1. Standard of Review

On permissive appeal under I.A.R. 12.1, this Court "reviews the magistrate judge's decision without the benefit of a district court appellate decision. A trial court's child custody decision will not be overturned absent an abuse of discretion. *Lamont v. Lamont* 158 Idaho 353, 356, 347 P.3d 645, 648 (2015) (citing *Roberts v. Roberts*, 138 Idaho 401, 403, 64 P.3d 327, 329 (2003). On the abuse of discretion standard of review, appellate courts consider: "(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an

exercise of reason." *Evans v. Sayler*, 151 Idaho 223, 226, 254 P.3d 1219, 1222 (2011) (quoting *Chavez v. Barrus*, 146 Idaho 212, 225, 192 P.3d 1036, 1049 (2008)). "An abuse of discretion occurs when the evidence is insufficient to support a magistrate's conclusion that the interests and welfare of the children would be best served by a particular custody award or modification." *Id.* (quoting *Nelson v. Nelson*, 144 Idaho 710, 713, 170 P.3d 375, 378 (2007)).

2. There is insufficient evidence that it would be in the best interests of B.G.S. to reside with Respondent during the school year and such a conclusion was not based upon an exercise of reason

In *Lamont*, this Court upheld the magistrate's determination that it was in the best interests of the children to stay with their mother, the historic primary physical custodian, even though she was relocating for better employment and education opportunities for the children. *Lamont v. Lamont*, 158 Idaho 353, 356–359, 347 P.3d 645, 648–51 (2015). The *Lamont* Court concluded that it was in the children's best interests to allow the relocation due to the children's current school system being underfunded and the financial sense it made for mother to pursue employment opportunities elsewhere. *Id.*

In *Doe*, this Court reversed the magistrate's determination that there was a material and substantial change of circumstances warranting a custody modification because there was insufficient evidence to sustain such a conclusion. *Doe v. Doe*, 161 Idaho 67, 383 P.3d 1237 (2016). While the *Doe* Court did not reach whether the magistrate abused its discretion in applying the best interests of the child analysis, its determination that there was not a substantial and material change of circumstances is enlightening. *Id.* The essence of the *Doe* decision is that there was not any evidence on the record that could support a conclusion that it was in the best interests of the children for custody to be modified. *Id.* One portion worth noting is that the

magistrate had determined that the strained relationship between the father and two of the children warranted a material and substantial change of circumstances. *Id.* This Court found the magistrate had abused its discretion because there was "scant" evidence on the record that the mother had done anything to inhibit the relationship with the children and their father and she always encouraged all of the children to go with their father during his parent time. *Id.* at 1248.

This Court took up the issue of a preference for 50/50 custody in its recent decision in *Martinez*. *Martinez v. Carrasco*, --- P.3d ---, 2017 WL 2645326, 6–8 (Idaho). The magistrate in that case, which is the same here, understood that I.C. § 32-717B(2) required a preference for 50/50 custody, regardless of the distance the child was required to travel. *Id.* The *Martinez* Court unequivocally stated that the statute does not mandate equal time or alternating physical custody back and forth. *Id.* at 7. Furthermore, this Court highlighted that the magistrate had abused its discretion because there was not any evidence, specifically expert evidence, presented at trial that would have suggested that the custody arrangement at issue in *Martinez* was in the child's best interest. *Id.* at 8.

Here, like the mother in *Lamont*, Lisa has historically been the primary custodian of B.G.S. The evidence before the Magistrate was that Lisa would have significantly better employment opportunities in Virginia and that B.G.S.'s educational needs would be significantly better served in a gifted and talented program in Virginia or Boise, just as the educational opportunities for the children in *Lamont* were better served in a less rural part of Idaho.

Just as in *Doe* and *Martinez*, here, there is not sufficient evidence to sustain the Magistrate's determination that it is in B.G.S.'s best interest to have Respondent as the primary physical custodian. All of the evidence presented at trial demonstrated that Respondent and

B.G.S had a good relationship under the 2013 Custody Order. There was no evidence presented that the 2013 Custody Order or Lisa kept Respondent from having a relationship with B.G.S., regardless of where she resided.

The 2013 Custody Order was specifically developed to accommodate the physical distance between the parties. Until November 2014, Lisa and B.G.S. lived in Virginia where Lisa pursued her education and Brooklyn attended great schools, which undisputedly provided more educational opportunities then even Boise, let alone Shelley. The sole reason for Lisa's relocation to Boise, Idaho was that she became seriously ill with Lyme's Disease and needed support from her extended family. There was no evidence whatsoever, just as in *Doe*, that Lisa moved or was planning to move to deprive Respondent of any of his visitation rights.

Just as in *Lamont*, the educational needs of B.G.S would have been best served by keeping the 2013 Custody Order, which would have allowed Lisa to return to Virginia or to remain at Boise. The logical interpretation of the Magistrate's decision is that it is in the best interest of this academically gifted child: to not stay in gifted and talented programs and good schools where she is challenged; change her primary custodian and attachment to the parent who has not been involved in her schooling (despite her living in the state of Idaho for more than two years) and who was so interested in receiving a substantially equal custody schedule that he waited 14 months to amend his petition, he had not requested additional time with Brooklyn in the two years she has lived in Idaho, and has not travelled to Boise to spend time additional time with her. This was not an not an exercise of reason on the part of the Magistrate.

Just as the mother in *Lamont*, Lisa's financial position is more stable. Where Respondent once earned over $100,000.00 per year working outside of Idaho in the oil fields for some three

weeks at a time, he lost his employment in May 2015. He testified that he did not expect to return to the oil fields and revealed at trial that he had obtained new, seasonal only employment. He was unsure about his future earnings but volunteered that he could work at McDonald's and make ends meet. While Respondent received positive credit from the Magistrate for owning the same home in Shelley, Idaho for five years, the reality of Respondent's employment in the oil fields is that he spent more time working in another state than living at his Shelley, Idaho home.

Lisa has been the parent involved in nurturing Brooklyn's education by doing homework with her, supporting after school activities, and going to parent/teacher conferences. Lisa works in education and holds two masters in Educational Psychology. She is uniquely qualified to assist her daughter in her continuing education. Additionally, if Lisa relocated to Virginia, Brooklyn would return to the same school district, the gifted and advanced program and neighborhood that they left in November 2014. In contrast, Respondent has not been involved in Brooklyn's school or activities despite her presence in Idaho.

There also does not appear to be any basis in reason for changing custody with a child who suffers separation anxiety from the current primary physical custodian. The Magistrate did not make any findings or discuss how it would be in the best interest of B.G.S. to be separated from Lisa when B.G.S suffers from separation anxiety when she is away from Lisa for a significant amount of time.[2] Therefore, this Court should find that the Magistrate abused his discretion by changing the custody arrangement from the 2013 Custody Order.

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[2] There did not appear to be anything on the record to say that B.G.S struggled with summer visitation with Respondent, but two and half to three months away from Lisa is substantially different than the nine months she would be away on the 2017 Custody Order.

3. The conclusion in the Magistrate's *Order re Motion to Reconsider* that a change in custody is warranted because B.G.S. has moved schools five times is not supported by the applicable legal standards nor is it reached through an exercise of reason.

While it is true that B.G.S. has moved schools five times since starting school, the determination to modify the custody schedule based upon this fact is not supported by the applicable legal standards nor is it reached through an exercise of reason in this case. The Magistrate failed to make a single finding of fact or conclusion of law on how the school moves had any effect whatsoever on B.G.S. Meaning, the Magistrate applied a *per se* standard that moving school five (5) times was detrimental to B.G.S. and warranted a custody modification. That is not the standard set by statute or this Court for modifying custody. I.C. § 32-717; *see generally Doe v. Doe*, 161 Idaho 67, 383 P.3d 1237 (2016).

The Magistrate failed to reach this determination through an exercise of reason. All the evidence presented at trial showed that B.G.S. was well adjusted with Lisa and had a great relationship with Respondent under the previous custody order. She was in the gifted and talented programs because of her high intellect. All the school changes except for the one from Virginia to Boise were a direct result of her being in the gifted and talented programs. The respective school districts made the determination on moving B.G.S. All indications on the record show this was in B.G.S.'s best interests as her academic excellence demanded that she be these programs. Moving her to a school that does not offer these services was not in B.G.S.'s best interests and was not reached through an exercise of reason. Therefore, the Magistrate erred as a matter of law and abused its discretion in continuing its change in the custody arrangement for B.G.S. on reconsideration.

4. **The conclusion in the Magistrate's *Order re Motion to Reconsider* that Appellant has not made any serious attempts to foster a good relationship between Respondent and B.G.S. is not supported by the applicable legal standards nor is it reached through an exercise of reason.**

What the Magistrate appears to be concluding on this particular conclusion is that Lisa has engaged in alienating behavior. Not making any serious attempts to foster a good relationship is not the standard for alienation. *Thurman v. Thurman* 73 Idaho 122, 128, 245 P.2d 810, 814 (1952); *see also Doe*, 161 P.3d at 1244. There must be some type of evidence on the record that custodial parent has contrived and engaged in a systematic effort to shake the love and affection the child has for the noncustodial parent. *Doe*, 161 P.3d at 1244. There is no such evidence on the record before this Court.

The Magistrate seems to support this conclusion by suggesting that Lisa should have offered Respondent more time since moving back to Boise. Frankly, it is unclear how she could have offered more time than what Respondent was entitled to have as he was essentially entitled to every minute that B.G.S. had a vacation from school. What is even more disturbing about this conclusion is that the Magistrate created a new legal standard for custody modification; that if you follow the court's orders, you still may be found to not be following them and have custody modified. This standard clearly is not based upon the legal standards laid out by this Court nor is there in any basis in reason for such a standard. It would open the door for more custody litigation and create extreme uncertainty for litigants because you could be found to have created basis for a modification of child custody by merely following court orders. Therefore, the Magistrate erred as a matter of law and abused its discretion in continuing its change in the custody arrangement for B.G.S. on reconsideration.

5. The conclusion in the Magistrate's *Order re Motion to Reconsider* that Appellant cares more about her career and is insensitive to the need of Respondent and B.G.S. to have a good relationship is not supported by the applicable legal standards

What the Magistrate appears to be concluding on this particular conclusion is that Lisa has engaged in alienating behavior. Caring more about one's career and being insensitive to the need of the noncustodial parent's relationship is not the standard for alienation. *Thurman v. Thurman* 73 Idaho 122, 128, 245 P.2d 810, 814 (1952); *see also Doe*, 161 P.3d at 1244. There must be some type of evidence on the record that custodial parent has contrived and engaged in a systematic effort to shake the love and affection the child has for the noncustodial parent. *Doe*, 161 P.3d at 1244. There is no such evidence on the record before this Court. Nor is there any evidence that Lisa's pursuit of a career has been detrimental to B.G.S. or the B.G.S.'s relationship with her father. Therefore, the Magistrate erred as a matter of law and abused its discretion in continuing its change in the custody arrangement for B.G.S. on reconsideration.

6. The conclusion that Lisa was anticipating a move to Virginia and another move in 2018 in the Magistrate's *Order re Motion to Reconsider* was not supported by the applicable legal standards and/or an exercise of reason

Since on reconsideration Lisa stated that she had turned down the Virginia position, that conclusion was supported by her affidavit. Furthermore, even if Lisa had still planned on moving to Virginia on reconsideration, the 2013 Custody Order provided permission and a visitation schedule for such a distance. There was no evidence presented at trial that it would be detrimental to B.G.S. if she were to return to Virginia with Lisa, in fact, all the evidence showed that it would actually be better for B.G.S. to be in Virginia as it would provide better educational opportunities and reunite her with her friends. To find that another move was anticipated in 2018

was also not supported by evidence as it was just as likely, if not more so, that Lisa would be able to stay in Virginia. If a move that was not anticipated in the 2013 Custody Order were to happen, then the proper remedy would be to address it then, not speculate as to whether it would take place or not.

7. The conclusion in the Magistrate's *Order re Motion to Reconsider* that Respondent will make Appellant and B.G.S.'s relationship a priority is not supported by the applicable legal standard and was not reached through an exercise of reason

Lisa testified that Respondent does not communicate with her when he has custody of B.G.S. There was no evidence presented by Respondent to dispute Lisa's testimony. Respondent's testimony is very telling and troubling on how he would be a primary custodian. He stated that he would handle the changes that come along with puberty by reading books and referring B.G.S. to her aunt, not her mother. This disturbing testimony shows that Respondent would prefer to foster B.G.S.'s relationship with *his* family then to allow Lisa to be a mother to her own daughter. Therefore, the Magistrate erred in maintaining the 2017 Custody Order on reconsideration.

C. THE MAGISTRATE ERRED IN HIS FINDINGS OF FACTS

1. Standard of Review

On permissive appeal under I.A.R. 12.1, this Court "reviews the magistrate judge's decision without the benefit of a district court appellate decision. "When reviewing the trial court's findings of fact, the appellate court will not set aside the findings on appeal unless they are clearly erroneous such that they are not based upon substantial and competent evidence." *Nelson*, 144 Idaho at 713, 170 P.3d at 378 (citing (*Reed v. Reed*, 137 Idaho 53, 56, 44 P.3d 1108,

1111 (2002)).

2. The findings of fact in the Magistrate's *Memorandum Decision and Order* dated January 6, 2017 were inadequate as a matter of law.

Findings of fact "are a formal, deliberate statement of a court's determination of facts... [and] are essential to support the decision and judgment rendered thereon." 75B Am. Jur. 2d Trial § 1674. "The opinion of a court giving the reasons for its decision... does not operate, and cannot be considered, as findings of fact." *Id.* "The failure to enter adequate findings of fact on material issues may be reversible error." 75B Am. Jur. 2d Trial § 1694.

The Magistrate did not make adequate findings as a matter of law. The Magistrate started each section stating the particular party testified to what it determined were "findings", but did not make any actual determinations. The "findings" were just a summary of the testimony each party gave without making any actual findings. This failure means that the Magistrate's conclusions of law were unsupported as a matter of law, including its determination of a material and substantial change of circumstances and that it was in the best interests of B.G.S. to primarily reside with Respondent. Without adequate findings of fact, there can be no conclusions of law. Therefore, the Magistrate committed a reversible error by failing to make adequate findings of fact.[3]

3. The finding in the Magistrate's *Order re Motion to Reconsider* that Appellant has not made any serious attempts to foster a good relationship between Respondent and B.G.S. is not supported by substantial and competent evidence

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[3] In a recent decision, this Court ordered a new trial judge on remand to make new findings of fact and conclusions of law. *Martinez v. Carrasco*, 2017 WL 2645326. The magistrate in that decision is the same at issue here. If this Court remands on this issue or any other issue, Lisa specifically requests a new trial judge.

There is nothing on the record that supports this finding. All the evidence presented at trial showed that Lisa did everything required of her to foster a good relationship between Respondent and B.G.S., including following the custody order. Respondent even stated that his relationship with B.G.S. was good. Therefore, this finding is not supported by substantial and competent evidence.

4. **The finding in the Magistrate's *Order re Motion to Reconsider* that Appellant is insensitive to the need of Respondent and B.G.S. to have a good relationship is not supported by substantial and competent evidence**

There is nothing on the record that supports this finding. All the evidence presented at trial showed that Lisa did all that is required for B.G.S. and Respondent to have a good relationship, including following the custody order. Respondent admitted as much by stating he had a good relationship with B.G.S. Therefore, this finding is not supported by substantial and competent evidence.

5. **The finding in the Magistrate's *Order re Motion to Reconsider* that Respondent will make Appellant and B.G.S.'s relationship a priority is not supported by substantial and competent evidence**

Lisa testified that Respondent does not communicate with her when he has custody of B.G.S. There was no evidence presented by Respondent to dispute Lisa's testimony. Respondent's testimony is very telling and troubling on how he would be a primary custodian. He stated that he would handle the changes that come along with puberty by reading books and referring B.G.S. to her aunt, not her mother. This disturbing testimony shows that Respondent would prefer to foster B.G.S.'s relationship with *his* family then to allow Lisa to be a mother to her own daughter. Therefore, this finding is not supported by substantial and competent

evidence.

D. APPELLANT IS ENTITLED TO ATTORNEY FEES AND COSTS ON APPEAL

1. Standard for Relief

I.C. § 12-121 allows for attorney fees on appeal if a case was defended frivolously, unreasonably, or without foundation. *Snider v. Arnold*, 153 Idaho 641, 646, 289 P.3d 43, 48 (2012).

2. Mr. Searle has defended this appeal frivolously, unreasonably, or without foundation

For the reasons outlined above, the Magistrate severely erred in modifying the custody arrangement in this case. There was no basis in the law or in reason for the change. Because of this lack of support in the law or in reason, any argument produced by Respondent will be frivolous, unreasonable, or without foundation.

IV. CONCLUSION

The Magistrate erred in determining that there was a material and substantial change of circumstances and modifying the custody arrangement for the reasons outlined above. Therefore, this Court should hold that the Magistrate erred and reinstate the previous custody order.

Respectfully submitted this 26 day of July, 2017.

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By: _____
Tracy W. Gorman
Attorneys for Appellant

CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY,
FACSIMILE OR ELECTRONIC MAIL TRANSMISSION

I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, either by mailing, hand delivery, telecopying or emailing to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; or by facsimile or email transmission.

DATED this 26 day of July 2017.

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